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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1203

CLAUDE CAULEY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARL TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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In the Supreme Court of these United States

Claude Cauley,
Petitioner

-vs-

United States of America,
Respondent

October Term, 1965

Criminal Case No.

Court of Appeals
21997

PETITION FOR A WRIT OF CERTIORARL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Claude Cauley, petitioner herein by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of January, 1966 and the order of the same Court denying rehearing entered on the 28th day of February, 1966.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to counsel as to the order denying rehearing is found in Appendix B. hereof.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b) (c) (1) (2) of the Federal Rules of Criminal Prodedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 11th day of January, 1966. (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.) and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.). Judgement of Court at Appendix F.

Questions Presented

I

Whether or not the trial court committed reversible error in permitting hearsay evidence to be given by the only Government witness, John P. Hays, as to the County in which the alledged offense was committed which established the venue of

the Court, all of which hearsay testimony was permitted by the Court over timely objections by the defendant.

II

Whether or not the trial court committed reversible error in permitting the prosecution to establish venue solely on the basis of hearsay evidence and evidence given in violation of the best evidence rule as to three counts of the indictment and on no evidence (not even hearsay) as to the three remain- counts of the indictment.

III

Whether or not the trial court and Circuit Court of Appeals for the Fifth Circuit committed reversible error in permitting the prosecution to refer to maps throughout the trial of the case, and without introducing the maps (under discussion) in evidence and without any offer by the prosecution to produce the maps.

IV

Whether or not the trial court committed reversible error in stating in the presence of the Jury the following statement, "I'll charge the Jury that either side could get him here," in referring to the Government witness who was in Federal Prison at Springfield, Missouri, at the time of the trial.

V

Whether or not the trial court committed reversible error in allowing the character of the defendant to be placed in issue over the objections if the defendant and under the pretense that the same was being allowed for impeachment purposes when no form of crime was established under the Laws of the United States or of any State, and without first establishing that the alleged previous conviction was by a Federal Court or State Court or Court of some foreign country.

VI

Whether or not the trial court committed reversible error in permitting the prosecution witness, John P. Hays to give testimony as to what he had seen on County maps without first establishing whether such maps were official or unofficial and without establishing whether such County maps were prepared by or under the supervision or with the approval of some private draftsman or Governmental agency.

Statutes and Rules Involved

United States Constitution, Article VI of the Amendments thereof (Sixth Amendment); Rule 18 of the Federal Rules of Criminal Procedure. Text of the same are set forth in Appendix E. hereof.

Statement of the Case

Your petitioner Claude Cauley was accused jointly with Willis Alonza McCauly for violation of the tax provision of the Revenue Code of the United States relating to distilled spirits, in violations of 26 U.S.D.C.A. Sections 5205 (a) (2), 5601 (a). The indictment contained six counts; two counts for possessing, two counts for selling and two counts for transporting non-stamp whiskey on two separate occasions at two separate places and alleging that all of these violations occurred in Irwin County, Georgia within the Middle District of Georgia of the United States District Court.

That thereafter a jury trial was had and evidence was presented to the Jury, a more complete and through statement of the evidence presented to the Jury is contained herein in Appendix D. Your petitioner was found guilty of all six counts and after adjudication of guilty, was sentenced to one year and one day imprisonment on each count concurrently.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A.) was entered on the 11th day of January, 1966, and that thereafter a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B.).

Reasons For Granting The Writ

Decision of the case sub judice is in direct conflict with other circuit decisions as follows: Dean v. U.S. 246 F2d 335, citing 187 F2d 449, U.S. v. Browne 225 F2d 751 (7th Cir.) and Hudspeth v. U.S. 233 F2d 848; and Numan v. U.S.A. (5th Cir.) 220 F2d 289 also Michealson v. U.S. 69SC & 213, 335 U.S. 469-Harget v. U.S. (5th Cir.) 183 F2d 889; in denying petitioner's petition for rehearing without opinion.

The Supreme Court, to the petitioner's knowledge, has never ruled specifically on the question of venue being established solely on hearsay and other inadmissible evidence to which proper and timely objection is made, and the question of requiring the defendant to answer a question as follows: "Have you ever been convicted for violation of the moonshine whiskey laws, "without establishing what state, country or province or what type of violation; all of which was required over due and timely objection of defendant.

In support of this it is respectfully urged that in said petition for rehearing it was pointed out to the Fifth Circuit Court of Appeals that all exidence given by the only Government witness other than hearsay evidence in connection with venue was given in violation of the best evidence rule under the common Law and that the Fifth Circuit Court of Appeals completely overlooked the fact that as to the last three counts of the indictment, the violations of which allegedly took place on a separate day and in a separate place, that the only Government witness, John P. Hays, would not even as much as hazard a guess as to what County these offenses occurred; whether Irwin County in the Middle District of Georgia or Coffee County in the Southern District of Georgia.

It was further pointed out to the said Court of Appeals in the motion for rehearing that the said witness, Hays, testified that as to the first three counts of the indictment that defendant was committing the offenses at a place approximately two miles West of Ambrose and that no matter in which direction you measure from Ambrose (due West, Northwest or South West) you are still in Coffee County in the Southern District of Georgia and yet the trial was held in the Middle District of Georgia; and that Hays failed to mention the name of any street, road, highway, bridge, church, graveyard, tractor shed, hog pen or any other place in particular so as to identify the situs.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying the petition for rehearing herein without opinion, and the writ

herein sought should be issued and the dicision of The Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

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Attorneys for Petitioner

By----------

Certification of Service

I hereby certify that a true and correct copy of the foregoing was this day of April, 1966, mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D.C.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21997

CLAUDE CAULEY,
Appellant,

versus

UNITED STATES OF AMERICA
Appellee.

Appeal from the United States District Court
Middle District of Georgia.

(January 11, 1966.)

Before BROWN, WISDOM and THORNBERRY, Circuit Judges

PER CURIAM: Appellant was found guilty by a jury of possessing, selling and transferring distilled spirits in containers not bearing the required stamps in violation of 26 U.S.C. 5205 (a) (2) and 5604 (a).

Alcohol and Tobacco Tax Investigator Hays was the Governonly witness. He testified that he and a government informer had on two occasions purchased moonshine whiskey from appellant. The two purchases allegedly took place within three-quarters of a mile from each other, and, according to Hays, occurred on a dirt road about two miles west of Ambrose, Georgia. It is conceded by both parties that this location is very close to the county line dividing Irwin and Coffee Counties. Irwin County is within the Valdosta Division of the Middle District of Georgia, but Coffee County is outside the Middle District.

Appellant's primary contention is that the District Court erred in overruling appellant's motion for directed verdict of acquittal based on the alleged failure of the prosecution to prove venue. Actually, under the circumstances of this case, the question of venue is identical to the question of territorial jurisdiction: since if it was not proved that the offenses occurred in Irwin County, the District Court would not be vested with jurisdiction.

The District Court properly changed the jury that venue must be established by a preponderance of the evidence. *Dean v. United States*, 8th Cir 1957, 246 F2d 335, and that the absence of direct proof of venue will not defeat conviction where inferences of venue may properly be drawn from circumstantial evidence. *Weaver v. United States*, 5th Cir. 1962, 298 F2d 496. In the *Dean* case, *supra*, it is significant that the court, while speaking in terms of venue, was actually faced also with a question of territorial jurisdiction (whether the crime was committed within the Western District of Missouri).

We hold that Investigator Hays' testimony in the instant case furnished sufficient evidence from which the jury could (and did) conclude that the offenses occurred in Irwin County. This being so, not only venue but jurisdiction was established.

On direct examination, Hays stated that the offences occurred in Irwin County. On cross-examination, Hays at first testified that he was sure the sales of the whiskey occurred in Irwin County, but later conceded that he was not absolutely positive. Hays stated that his knowledge that the offenses

took place in Irwin County was based in part upon what others had told him concerning the location of the county line, and in part on his own examination of a county map. It was therefore not reversible error to refuse to strike Hays' testimony, in view of the rule that testimony as to a fact which the witness knows personally is not inadmissible because he also knows it from hearsay. See 31A C.J.S. /203, and cases therein cited

We have examined all of the other contentions raised by appellant, and have determined that they are without merit.

Accordingly, the judgement is AFFIRMED.

Appendix -B-

(128)
Thornberry

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 21,997

CLAUDE CAULEY,
Appellant

vs

UNITED STATES OF AMERICA.
Appellee

Appeal from the United States District Court

for the Middle District of Georgia

FEBRUARY 28, 1966

ON PETITION FOR REHEARING

Before BROWN, WISDOM and THORNBERRY, Circuit Judges.
PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

(COPY) **In the United States Court of Appeals for the Fifth Circuit**

(No. 21997)
Judgment Affirmed on 11 January 1966.

Motion for Rehearing

Comes now the appellant in the captioned matter, and by and through his undersigned counsel of record moves this Court to grant him a rehearing of his appeal in order to prevent a grevious injustice upon the following grounds, to wit:

1. The finding of this Court was based in part on an erroneous conculusion or understanding of the Court that counsel conceded that the location was close when counsel for the appellant stated to the Court that no matter how you measure you are always in Coffee County when measuring two miles from Ambrose.

2. Whatever evidence offered by the only government witness, Hays, that could be considered personal knowledge was completely inadmissible and illegal in that it was in violation of the best evidence rule and Hays offered no facts to give credence to his personal belief such as the name of a street or road, the name of a bridge, creek or church, nor did he tell on whose land he was located.

3. The finding of this Court was based in par t on an erroneous finding of fact or misinterpertation of the record before the Court in gleaning the conclusion from the record that Hays had looked at a "county" map when he testified to no such thing. Hays testified that "they got the county maps" but didn't state what kind of county map or who drew it, nor did he offer to show the jury this map.

4. The Court completely overlooked the fact that the record shows that Hays testified that on the second transaction involving three counts that he would not even attempt to hazard a guess as to what County he was located in.

Counsel most respectfully and humbly asks this Court of Appeals to permit him to submit a brief on this motion for rehearing.

This motion is hereby filed within twenty-one days from the date of the judgment of this Court, and the undersigned counsel hereby certifies that this motion is not filed for delay and that it is presented in good faith with the utmost urgency.

This the 24th day of January, in the year of our Lord, 1966.

Respectfully submitted, ROBERT CORK
Counsel for Appellant

Appendix -D-

Exhibit D

Portions of Testimony to the Petition for The Writ of Certorari

John P. Hays, the only witness for the government testified that he was a criminal investigator for the U.S. Treasury Department and that on August 9, 1963, he and Dorsey Davis, a paid informer for The United States were on a dirt road in Irwin County, Georgia, about two miles West of Ambrose and that they drove to a small frame house on the dirt road and met the defendant at the house and that Dorsey Davis asked Claude Cauley if he had the whiskey and that Mr. Cauley said that he did; that they then drove out into the woods and got the whiskey; that it was just a dirt road, (not a very well travelled road) and not a County road, on which they drove about 200 yards (R5, 6, 7, and 8). That on August 20 they returned to the same place and found the defendant but went to a diffenent place for the whiskey about one-half mile or three-quarters (R36) of a mile distant from the first transaction but the direction of the second place unknown and no idea as to what County the second violation took place, and that both times the defendant was paid with government funds, and that the government had made no effort (R17) to have informer in Court. This prosecution witness further testified that he did not know where the line between the Counties of Coffee and Irwin (the division line between the U.S. Districts) was but that the paid informer (former boot-legger) told him Irwin (R24) and they looked at a County map in Waycross and it appeared to be Irwin County (R25). All objections to this hearsay testimony were over-ruled by the trial Court: (R25 and R26) and the government witness testified that he did not know how far he was from the County line (R27) nor was any map produced, nor could said witness state postively as to what County he was (R33), that he did not know whether the said map was official and objection to the non production of the map as being the the highest and best evidence was over-ruled by the trial Court (R40-43).

Under cross-examination the United States Attorney asked the defendant the following question as the first question and without offering this question for the purpose of impeachment and without making any statement for the reason

for the question but simply asked as follows: "Mr. Cauley, would you tell the Court and the Jury whether or not you have been convicted of a felony that involved moon-shine whiskey" (R58-59); this question was striken and the United States Attorney asked the following question in lieu thereof: "Mr. Cauley, it is true, is'nt it, that in 1950 you were sentenced to serve a year and a day after you pled guilty to violation to moonshine whiskey laws? Answer, Yes Sir, and objections were timely interposed as bringing the defendant's character in issue, but such objections were over-ruled (R59-60-61-62-63-64).

With reference to the paid informer not being presented in Court and that such informer was then in the federal penitentiary, the trial Judge remarked "I'll charge the jury that either side could get him here." (R17-18).

At (R20-21-22) the government witness stated that he took the 117 gallons of whiskey to Waycross and the reason he knew it was whiskey in each container was because the other revenue agents would have examined it before pouring it out, but that none of such agents was present in Court and the defendant then and there asked that this testimony based on the knowledge of other revenue agents not in the presence of defendant be ruled out which objection was over-ruled.

Appendix -E-

Constitution of the United states,
Sixth Amendment (Article VI.)

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Rule 18 of the Federal Rules of Criminal Procedure (Venue)

District and division. "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

Appendix -F-

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 21997

D.C. Docket No. 2352- Criminal Action

CLAUDE CAULEY, Appellant,

versus

UNITED STATES OF AMERICA Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, WISDOM and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came of to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 11, 1966

Issued as Mandate: Mar. 9, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1203

CLAUDE CAULEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 355 F. 2d 175.

JURISDICTION

The judgment of the court of appeals was entered January 11, 1966. A petition for rehearing was denied on February 28, 1966. On March 30, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to April 16, 1966, and the peti-

tion was filed on April 11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence of the place of the crime was sufficient to establish venue.

2. Whether testimony relating to petitioner's past conviction was properly admitted into evidence.

STATEMENT

Petitioner and his son were indicted on six counts of unlawful possession of whiskey without proper tax stamps.[1] After a trial by jury in the United States District Court for the Middle District of Georgia, petitioner was convicted on all counts and sentenced to concurrent terms of imprisonment for a year and a day (R. 94).[2] The court of appeals affirmed *per curiam*.

An agent of the Alcohol and Tobacco Tax Unit testified that on August 9, 1963, he and a paid informer rode out to a house on a dirt road in Irwin County about 2 miles west of Ambrose, Georgia (R. 6).[3] They met petitioner and his son at the house and

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[1] Petitioner's son pleaded guilty before the trial (R. 4).

[2] "R." refers to the record on appeal which is on file with the Clerk of this Court.

[3] The 1966 Rand McNally Commercial Atlas shows that Ambrose is less than two miles east of the Irwin County line. Irwin County is in the Middle District of Georgia whereas Ambrose is in Coffee County within the Southern District.

were told that the latter had the whiskey. Thereupon the group proceeded about 200 yards in the agent's car down a field road where petitioner went into the woods and brought out 117 gallons of whiskey (R. 7-8). The group then loaded the whiskey into the agent's car and the agent observed the informer pay petitioner and his son $491.00 (R. 8).[4]

On August 20, 1963 the agent and his informer purchased 20 gallons of whiskey from petitioner at a barn adjacent to the dirt road described above (R. 10). On both occasions the agent tasted and smelled the whiskey and observed that no tax stamps were affixed to the containers (R. 8, 10).

On cross-examination, the agent testified that he knew that these transactions occurred in Irwin County on the basis of advice from other agents, the informer, and from a study of a county map that hung in his office (R. 27-28, 31). Petitioner moved to strike all of the agent's testimony relating to location as being based on hearsay (R. 28).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 3-5), the proof of venue was sufficient. The agent testified on direct that he met petitioner "on a dirt road in Irwin County, Georgia, about two miles west of Ambrose" (R. 6).[5] He described the location of the first of-

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[4] Petitioner told the informer that he and his son owned the whiskey jointly.

[5] Irwin County is in the Middle District of Georgia. On the east it is adjacent to Ambrose in Coffee County, which is in the Southern District of Georgia.

fense as being on a field road into a scrub pine woods off a county road (R. 6, 7, 23) and the second offense as being at an old barn on the side of the same county road (R. 10, 36). The jury drawn from the district could and did conclude from the description of the location that the offense was committed in Irwin County. See *George* v. *United States*, 125 F. 2d 559, 564 (C.A.D.C.). The facts brought out on cross-examination—that the agent's testimony that the place of meeting was in Irwin County was based on conversations with others and a study of a county map—went to the weight of his testimony and not to its admissibility. The agent's testimony, which was unrefuted, was sufficient to support the jury's verdict. See *Dean* v. *United States*, 246 F. 2d 335, 338 (C.A. 8), and cases cited therein.

2. Petitioner argues that a question put to him on cross-examination relating to a past conviction was improper because it was indefinite (Pet. 4). The question quoted by petitioner was withdrawn. Instead, the government asked petitioner if "in 1950 you were sentenced to serve a year and a day after you plead guilty to violation of the moonshine whiskey laws." He answered in the affirmative (R. 64-65). The question relating to this past felony conviction was definite as to date and sentence. It was properly used for impeachment and was so limited by the court's instruction (R. 89).[6]

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[6] Petitioner raises but does not argue the contention that the judge erred in commenting on the availability of a potential witness, the informer who was with the agent and who was then in jail (Pet. 2, Question IV). The agent

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
DONALD I. BIERMAN,
Attorneys.

MAY 1966

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was asked on cross-examination whether the informer was present and whether the government did not have the facilities to produce him. The court first stated that either side could get the witness (R. 17), but he immediately corrected this and stated that "the processes of this Court are available to you and the government" (R. 18). This was a correct statement of the law.

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